

## **MANDATORY CLAIM FILING W/ FORFEITURE (Similar to SB 76)**<sup>1</sup>

- **Supreme Court Order to file**

Required filing for water right claims for stock and individual as opposed to municipal domestic uses based upon instream flow or ground water sources. (§85-2-212, MCA).

FAILURE TO FILE A CLAIM AS REQUIRED BY LAW WILL RESULT IN A FORFEITURE OF THE WATER RIGHT.<sup>2</sup>

- a. File with DNRC Regional Offices.
- b. Filing deadline on X certain date (approximately one year from date of notice).

Note: DNRC staffing for claims examination is substantially reduced after 2015, and new legislation in 2013 would be required, which would put a one-year filing deadline out to 2014.

- **Notice**

Similar to §85-2-213, MCA.

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<sup>1</sup> The following draft is for discussion purposes only and was prepared at the request of the Montana Water Court. The Montana Department of Natural Resources and Conservation takes no position on whether filing should be mandatory.

<sup>2</sup> The selection of the term “forfeiture” is based on ruling of the Montana Supreme Court after initiation of the adjudication. *See Matter of Yellowstone River* (1992) 253 Mont. 167, 176, 832 P.2d 1210, 1215 (“The Water Court, in reliance on the United States Supreme Court, ruled that despite the use of the word abandonment, § 85-2-226, MCA, is a forfeiture statute. *United States v. Locke* (1985), 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64; *Texaco, Inc. v. Short* (1982), 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738.”) The Montana Supreme Court in *Matter of Yellowstone River* further ruled and explained,

*We further conclude that § 85-2-226, MCA, is a proper exercise of the police power, satisfies all of the guidelines necessary to enact a forfeiture statute and complies with all aspects of due process as required by the Montana Constitution and the Constitution of the United States. ...The United States Supreme Court held:*

*Even with respect to vested property rights, a legislature generally has the power ... to condition their continued retention on performance of certain affirmative duties. As long as the ... duty imposed is a reasonable restriction designed to further legitimate legislative objectives, the legislature acts within its powers in imposing such ... duties. (citations omitted) United States v. Locke (1985), 471 U.S. 84, 105 S.Ct. 1785, 85 L.Ed.2d 64.*

*[2] We conclude that Article IX, Section 3(1), of the Montana Constitution does not establish that pre-1973 water rights are immune from sovereign powers. These rights, like other property rights, are protected against unreasonable state action; however, they have not been granted indefeasible status. Furthermore, we conclude that consistent with Article IX, Section 3(1), of the Montana Constitution, the State Legislature may enact constitutionally sound regulations including the requirement for property owners to take affirmative actions to maintain their water rights.*

- Claim Filing

Claim filing includes information similar to §85-2-224, MCA, and includes number and type of livestock and supporting information demonstrating the actual use.

- Claims Examination

Claims examination would be for all claims and as currently performed.

- No *Prima Facie* status

Claims are not entitled to *prima facie* status and the claimant bears the burden of proof on all elements of the claim.

(*Alternative* – Claims examination results have *prima facie* status.)

- Claims are adjudicated as currently

Claims are adjudicated as feasible with current decree proceedings, and where necessary, when decrees are otherwise reopened.

- Objections

Objection periods and processes would apply as currently.

(*Alternative* – Provide there will be no Remarks on a claim if the claim is under a certain amount such as 2 acre-feet and claims examination finds evidence that the use existed.)

- Forfeiture of all rights not timely filed

(*Alternative* – All instream stock rights are forfeited if not timely filed. Late domestic claims could be accepted under a decree amendment process, but limited to 1 acre-foot and still subject to claims examination. Claimant pays all associated costs of notice and claims examination, etc.)